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No. 05-381

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* THE CAMPBELL GROUP; FOREST SYSTEMS, LLC; GLOBAL FOREST PARTNERS LP; HANCOCK NATURAL RESOURCE GROUP, INC.; MENASHA FOREST PRODUCTS CORP.; PLUM CREEK TIMBER COMPANY, INC.; AND RESOURCE MANAGEMENT SERVICE, LLC, SUPPORTING PETITIONER

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QUESTION PRESENTED

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), this Court held that an antitrust plaintiff alleging predatory selling must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

The question in this case is whether a plaintiff alleging predatory buying may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs "than it needed" or paid a higher price for those inputs "than necessary," so as "to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price"; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the "higher" *Brooke Group* standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

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CASES

Amer. Tobacco Corp. v. *United States*, 328 U.S. 781 (1945) 16

Arizona v. *Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) 16

Atlantic Richfield Co. v. *USA Petroleum Co.*, 495 U.S. 328 (1990) 5

Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) 8

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) ..... *passim*

Cackling Acres, Inc. v. *Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976) 16

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Kartell v. *Blue Shield of Mass.*, 749 F.2d 922 (1st Cir. 1984) 6, 10

Khan v. *State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), rev'd on other grounds, 522 U.S. 3 (1997) 17, 18

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) 16

Mandeville Island Farms v. *Amer. Crystal Sugar Co.*, 334 U.S. 219 (1948) 8, 15, 18

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... *passim*

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Morton Salt Co. v. *United States*, 235 F.2d 573 (10th Cir. 1956) 16

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Spectrum Sports, Inc. v. *McQuillan*, 506 U.S. 447 (1993) 3

United Airlines, Inc. v. *U.S. Bank N.A.*, 406 F.3d 918 (7th Cir. 2005) 18

United States v. *Champion Int'l Corp.*, 1975-2 Trade Cases ¶ 60,453 (D. Or. 1975), aff'd, 557 F.2d 1270 (9th Cir. 1977) 14

United States v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 223 (1940) 15, 16

Verizon Communications Inc. v. *Trinko*, 544 U.S. 398 (2004) 11

FEDERAL STATUTES

15 U.S.C. § 1 ..... *passim*

15 U.S.C. § 2 ..... *passim*

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16 U.S.C. § 472a 14

REGULATORY MATERIALS

62 Fed. Reg. 9636 (1997) 9

MISCELLANEOUS

P. Areeda & H. Hovenkamp, *Antitrust Law* (2d ed. 2002) 12

P. Areeda & L. Kaplow, *Antitrust Analysis* (5th ed. 1997) 9

R. Blair & J. Harrison, *Monopsony* (1993) 6, 10

TABLE OF AUTHORITIES—Continued

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I. Gomez, *et al.*, *Alternative Price Expectations Regimes in Timber Markets*, 5 J. Forest Econ. 235 (1999) 12

J. Howard, U.S. Dept. of Agric., *U.S. Timber Production, Trade, Consumption, and Price Statistics 1965-1999* (2001) 18

E. Kerwel & W. Strack, FCC, *Auctioning Spectrum Rights* (Fed. 20, 2001) 9

J. Prestemon & D. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 Southern Forest Economics Workshop (1998) 13

J. Schumpeter, *Capitalism, Socialism, and Democracy* (3d ed. 1950) 12

A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Modern Library ed. 1994) (1776) 10

U.S. Census Bureau, *Statistical Abstract of the United States: 2004-2005* (2005) 19

D. Wear & P. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199 (1999) 13

R. Yin & D. Newman, *A Timber Producer's Entry, Exit, Mothballing, and Reactivation Decisions Under Market Risk*, 5 J. Forest Econ. 305 (1999) 12

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INTEREST OF *AMICI CURIAE*

The Ninth Circuit's decision in this case holds that a purchaser—here, a purchaser of alder sawlogs—may be held liable for treble damages under Section 2 of the Sherman Act, 15 U.S.C. § 2, for paying more than "necessary," without any showing that the prices paid made its operations unprofitable or that the purchaser could recoup the supposed excess payments by charging higher prices for its goods (or paying lower prices for inputs) later on. *Amici curiae*—The Campbell Group; Forest Systems, LLC;

Global Forest Partners LP; Hancock Natural Resource Group, Inc.; Menasha Forest Products Corp.; Plum Creek Timber Company, Inc.; and Resource Management Service, LLC—are owners and managers of some of the largest private timberlands in the Nation. They are in the business of harvesting trees and selling logs to companies like petitioner and respondent. As a result, they have a profound interest the Ninth Circuit's decision in this case. By establishing an unintelligible standard for antitrust liability (imposing liability for paying more than a "fair" price or for buying more logs than "necessary"), the decision chills price competition for the trees and logs that *amici* sell. That injures not merely *amici*, but consumers as well. By lowering the prices of *amici*'s goods, the decision reduces the incentive to expand supply—by reaching out to otherwise uneconomic timberlands—in times of high demand. And it distorts the market by preventing price competition from allocating resources to the highest-value buyers.[1]

STATEMENT

1. Congress enacted the Sherman Anti-Trust Act, 15 U.S.C. § 1 *et seq.* ("Sherman Act"), to prohibit persons in interstate commerce from accumulating and exploiting market power. Section 2 of the Sherman Act provides, in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony * * *." Federal antitrust law also provides a treble damages remedy for those injured by violations of the Act. 15 U.S.C. § 15.

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[1] The parties have consented to the filing of this brief in writing. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

This Court has interpreted Section 2 to prohibit "predatory" behavior, such as *selling* goods at a price designed to drive competitors out of business, but only if the goods are sold *below* cost and such conduct poses "a dangerous probability of actual monopolization." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 455 (1993); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). This case concerns whether similar principles apply to allegedly exclusionary *purchasing* conduct.

2. In general, the alder sawlog market of the Pacific Northwest comprises three categories of participants: (1) timberland owners and managers, which harvest and supply raw logs; (2) production facilities (*i.e.*, sawmills), which process the raw material into finished lumber; and (3) purchasers of processed material, who buy lumber for use in various consumer products. Pet. App. 2a-3a. *Amici* fall into the first category: They manage timberlands, harvest trees, and supply raw logs. Petitioner Weyerhaeuser Company is in the second category: It owns and operates production facilities. From 1996 to 2001, Weyerhaeuser purchased approximately 65% of the alder sawlogs marketed for processing in the Pacific Northwest. *Id.* at 3a. During that time, several sawmills in the region closed, but others opened. Pet. 3.

Respondent Ross-Simmons Hardwood Lumber Co. operated a competing production facility that closed in 2001. Pet. App. 3a. It filed suit against Weyerhaeuser, claiming that Weyerhaeuser violated Section 2 of the Sherman Act by attempting to monopolize the alder sawlog market in the Pacific Northwest. Respondent alleged that Weyerhaeuser overpaid for and overpurchased, through contractual commitments, alder sawlogs to drive competing production facilities out of business. *Ibid.* Respondent, however, did not allege that Weyerhaeuser paid so much that its business became unprofitable. Pet. 5.

At the close of trial, the district court instructed the jury that it could find Weyerhaeuser guilty of violating the Sherman Act if it found that Weyerhaeuser "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price." Pet. App. 7a n.8. The jury found for respondent, and the court awarded treble damages in the amount of $78,769,218. *Id.* at 4a. The trial court denied Weyerhaeuser's motion for judgment as a matter of law or for a new trial. *Ibid.*

3. The court of appeals affirmed, holding that allegations of predatory *buying*—as opposed to the charges of predatory *selling* at issue in *Brooke Group*—did not require a showing that (1) Weyerhaeuser's predatory behavior was unprofitable in the short term, or that (2) Weyerhaeuser had a dangerous probability of recouping short-term losses once its competitors had exited the market. Pet. App. 7a. The court of appeals concluded that "an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." *Id.* at 8a-9a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is not merely out of step with the decisions of other courts of appeals and standard principles of antitrust law. It also throws a judicial monkey-wrench into the machinery of competition. By licensing juries to substitute their assessment of a "fair" price and the "necessity" of purchases for the discipline of the competitive market—without any showing that the defendant's conduct was unprofitable or would result in the recovery of monopoly profits—the decision chills price competition among purchasers of inputs. Exposed to the threat of treble-damages actions for paying "too much" for needed inputs, purchasers will necessarily curtail their bids.

That has profound consequences. By muting price competition among purchasers, the decision below limits the price increases that, in times of shortage, typically drive timberland owners to augment supply by accessing and harvesting trees from lands that otherwise would not be economically viable. More important, the decision distorts the market in favor of less efficient purchasers. As a matter of fact and theory, price competition for inputs among purchasers allocates resources to the purchaser that values them most highly. By barring efficient purchasers who value inputs most highly from bidding aggressively for those inputs, the Ninth Circuit's decision effectively redirects those goods to less efficient producers who value them less. That injures competition; it injures sellers; and it injures consumer welfare. This Court's immediate intervention is necessary to avoid widespread consequences for the timber industry and other major industries throughout the Ninth Circuit.

I. The Ninth Circuit's Reasoning Is Fundamentally At Odds With This Court's Precedents And The Economic Principles That Undergird Them

A. The Ninth Circuit's Decision Undermines This Court's Decision In *Matsushita* And Its Progeny

1. On its face, procompetitive behavior is often indistinguishable from anticompetitive conduct. No less than would-be monopolists, fierce competitors in fully competitive markets are always out to beat the competition. The difficulty of distinguishing aggressive competition from anticompetitive conduct arises with particular force where "predatory" behavior is alleged. Predatory selling, for example, involves an attempted monopolist's price-cutting to eliminate competition. But healthy price competition also involves sellers' price-cutting to win market share. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990). Conversely, "predatory buying" involves bidding up the price of a production input until the competition can no

longer afford to purchase the input, driving it out of business. R. Blair & J. Harrison, *Monopsony* 66 (1993). But the "competitive instinct" of all buyers competing for valuable resources is "to bid up price." *Kartell* v. *Blue Shield of Mass.*, 749 F.2d 922, 925 (1st Cir. 1984).

In *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court confronted that difficulty and established the ground rules for distinguishing procompetitive (or competitively neutral) conduct from "predatory" behavior. Noting "a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful," 475 U.S. at 589, the Court explained that "courts should not permit factfinders to infer" such conduct "when such inferences are implausible * * * ." *Id.* at 593. The Court thus imposed two requirements that must be met by any plaintiff alleging predatory pricing. First, conduct that is "as consistent with permissible competition as with illegal [conduct] does not, standing alone, support an inference of antitrust [violations]." *Id.* at 588. Thus, plaintiffs must show conduct that is *inconsistent with* permissible competition. Second, a plaintiff's allegations of anticompetitive conduct must be grounded in economic reality: "[I]f the factual context renders [plaintiff's] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.

In *Brooke Group*, this Court applied *Matsushita*'s requirements to allegations of predatory selling in violation of Section 2 of the Sherman Act. 509 U.S. at 222-224. At the outset, the Court noted that "sound antitrust policy" cannot "be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition." *Id.* at 224. Accordingly, the Court held that it was not enough to prove that a competitor charged less than it could have. Instead, the plaintiff "must prove that the

prices complained of are below an appropriate measure of [the defendant's] costs." *Id.* at 222. In addition, the Court reiterated *Matsushita*'s requirement that allegations of anticompetitive conduct must be economically "plausible." See *id.* at 224 (citing *Matsushita*, 475 U.S. at 589). In the case of predatory pricing, the Court explained, the predator effectively endures losses in the short term, treating those losses as an investment to be recouped through later monopoly profits. "For the investment to be rational," the Court observed, "the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Ibid.*

2. In this case, the Ninth Circuit refused to apply *Matsushita* and *Brooke Group* to allegations of predatory buying in violation of Section 2 of the Sherman Act. First, the Ninth Circuit refused to require proof that Weyerhaeuser purchased the raw materials at prices that were economically unprofitable for it. See Pet. App. 7a. (Indeed, it is our understanding that Weyerhaeuser's alder sawmill business operated at a profit during the relevant period. Pet. 5.) Second, the Ninth Circuit refused to require proof that Weyerhaeuser had a dangerous probability of recouping short-term losses by either charging (high) monopoly prices, or paying (low) monopsonistic prices, later on. See Pet. App. 7a. The court of appeals justified that refusal by arguing that those requirements apply only in cases of sell-side predatory conduct because "benefit[s] to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing. * * * No consumer benefit results during [the] predation period if the firm raises or maintains the same price level for its finished products." Pet. App. 9a-10a.

That reasoning cannot be squared with *Matsushita*, *Brooke Group*, or basic economic theory. *First*, although *Matsushita* and *Brooke Group* both involved predatory selling claims, those cases offer no reason why their analysis

would not apply with equal force to predatory buying claims. The risk of deterring procompetitive conduct is equally inherent in both types of claims. Just as "cutting prices in order to increase business is often the very essence of competition," *Matsushita*, 475 U.S. at 594, so too is competing for raw materials with other bidders on the basis of price. From the perspective of the alleged predator, the two acts are indistinguishable—both diminish profits but also offer potential competitive advantages. As *Matsushita* broadly explained, "[w]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Ibid.* (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)). The Ninth Circuit's limitation of *Matsushita* to predatory *sales* thus ignores this Court's fundamental concern about judicial intervention and condemnation—upon pain of treble damages—of potentially procompetitive conduct.

Second, the Ninth Circuit's attempt to distinguish *Matsushita* turns on the flawed assumption that the only "procompetitive conduct" to consider is that which creates immediate "consumer benefit." That is, the Ninth Circuit conflates competition with short-term consumer price cuts. As explained below, that is wrong as a matter of basic economics. See pp. 9-14, *infra*. But it is also wrong as a matter of law. *Matsushita* did not narrowly define procompetitive benefits *solely* as reduced prices. To the contrary, the Court warned that mistaken inferences "chill the very conduct the antitrust laws are designed to protect * * * [,] discouraging legitimate price competition," 475 U.S. at 594, without limiting that admonition to price cuts with an immediate consumer impact. Simply put, the antitrust laws do not focus solely on short-term price reductions for consumers. Rather, they seek to protect full competition in the marketplace generally. See *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) ("The

[Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers."); see also pp. 14-17, *infra*.

B. The Ninth Circuit's Decision Deters The Procompetitive Conduct This Court's Precedents Protect

The Ninth Circuit's decision is also inconsistent with economic reality—and, as a result, threatens the very efficiency and competition this Court's precedents seek to protect. Price competition among purchasers allocates inputs to those buyers who, because they will be the most efficient and intensive users, value the inputs most highly. Higher prices resulting from competition for inputs, moreover, often signal and permit increases of supply that will alleviate shortages. By muting price competition for inputs, the Ninth Circuit's decision interferes with both mechanisms. It allocates scarce resources to *less* efficient users who, because they value the resources less highly, are unwilling to pay as much for them. And it prevents the sorts of price increases that, in properly functioning markets, signal sellers to bring additional inputs to the market where, absent price increases, doing so would be uneconomic.

1. "Price is the central nervous system of the economy." *Nat'l Soc'y of Prof. Engineers* v. *United States*, 435 U.S. 679, 692 (1978) (quotation marks omitted). It is price in the first instance that directs inputs and resources to their most productive use. When prices, set by competition, accurately reflect demand for the production input, then the supply of that input will be allocated efficiently to those who can make the most productive use of it. P. Areeda & L. Kaplow, *Antitrust Analysis* 7-8 (5th ed. 1997). For that very reason, the United States has adopted a policy of allocating some scarce public resources (such as electromagnetic spectrum) to the highest bidder. Simply put, "competitive bidding" ensures that each resource is made "available to those who value it most highly and therefore are most likely to put it to its most economically efficient

use." 62 Fed. Reg. 9636, 9640-9641 (Mar. 3, 1997) (spectrum auctions); see E. Kwerel & W. Strack, FCC, *Auctioning Spectrum Rights* 2 (Feb. 20, 2001) (assigning licenses to high bidders allocates them to "the parties that value them most highly," *i.e.*, those who are "generally best able to provide consumers with the services they most want, while using the spectrum most efficiently."), available at http://wireless.fcc.gov/auctions/data/papersAndStudies/aucspec.pdf. If a purchaser cannot compete effectively for inputs in an otherwise competitive market, the most logical explanation is that its higher-bidding competitors are more efficient and better able to put the resource to a higher-value use—not that they are behaving nefariously.

The Ninth Circuit's decision ignores that fundamental economic reality. Instead, it suggests that even economically rational purchasing behavior (*i.e.*, bidding more than competitors for raw materials where a profit can still be made) is evidence of anticompetitive behavior. That is simply not the case. In competitive markets, producers of finished goods *will* bid up the price of raw inputs.[2] For the reasons given above, that is both expected and healthy. Where competitors openly and aggressively compete for inputs in a free market, the market allocates the goods to the competitor that values them most highly and that will put them to their best use. When that occurs, consumers are the ultimate beneficiary. And when it does not occur—

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[2] See, *e.g.*, Blair & Harrison, *Monopsony*, *supra*, at 66 (contrasting competitive prices with monopsonist prices); *Kartell*, 749 F.2d at 925 (explaining that the "competitive instinct" of all buyers is "to bid up price"); Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Book One, ch. VII (Modern Library ed. 1994) (1776) (explaining that, where demand for a commodity outpaces supply, "[a] competition will immediately begin among [buyers], and the market price will rise * * * , according as either the greatness of the deficiency, or the wealth and wanton luxury of the competitors, happen to animate more or less the eagerness of the competition").

when resources are allocated to less efficient participants—it is consumers that suffer.

The Ninth Circuit's decision not only ignores, but also affirmatively undermines, price as an efficient allocation mechanism. Under the Ninth Circuit's rule, the most efficient and best user of sawlogs (or any other input) cannot outbid others without risking treble-damages liability for paying more than what a jury determines to be "fair" prices. That is true even if the more efficient purchaser (as here) uses all that it buys. That is true even if the more efficient purchaser (as here) continues to make a profit while paying higher prices. Perversely, the reward for greater efficiency is, under the Ninth Circuit's approach, not competitive advantage but treble damages liability. That is precisely the sort of result this Court has warned against. "Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Verizon Communications Inc.* v. *Trinko*, 540 U.S. 398, 414 (2004) (internal quotation marks omitted).

The long-run consequences of the Ninth Circuit's rule are deeply troubling. If price is the "central nervous system" of the market economy, efficiency is the muscle that drives growth. Less efficient competitors (in this case, competing sawmills) would undoubtedly prefer not to face pressure to improve efficiency, including the pressure that results from price competition for supplies.[3] But that pressure and the potential for their demise is the "creative destruction" necessary for the free market to satisfy con-

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[3] Cf. *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 466 U.S. 752, 763 (1984) ("[C]omplaints about price cutters are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals. Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, arise in the normal course of business and do not indicate illegal concerted action.") (quotation marks omitted).

sumer preferences. That process *is* the "essential fact about capitalism." J. Schumpeter, *Capitalism, Socialism, and Democracy* 83 (3d ed. 1950). The Ninth Circuit's decision unnecessarily intrudes into that process by protecting inefficient firms from their own shortcomings—or rewarding them for failure with treble damages awards—while condemning more efficient ones for competing effectively as buyers.

2. The Ninth Circuit's rule also imposes inappropriate inefficiencies on the suppliers of raw materials. In fully competitive markets, suppliers react to pricing signals by increasing or decreasing their investment in the production of the input. As Professors Areeda and Hovenkamp aptly note, if input producers "are forced to accept less than the competitive price for their product, * * * the result will be that individual [producers] will either produce less or stop producing at all. [Input buyers] will purchase fewer [inputs] and * * * will also produce less [of their finished product]." 12 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 2011b1, at 128-129 (2d ed. 2002).

For example, in the alder sawlog industry, certain timberlands that are more expensive to purchase or harvest (*e.g.*, remote areas, or those with difficult terrain) ordinarily will not be utilized. In the event that demand increases suddenly and sawlog purchasers begin paying higher prices, suppliers can and will put additional lands, including higher-cost timberlands, into profitable service.[4] Increasing price

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[4] See, *e.g.*, I. Gomez, *et al.*, *Alternative Price Expectations Regimes in Timber Markets*, 5 J. Forest Econ. 235 (1999) ("Price expectations play a critical role in timber markets. Each period, producers must decide whether to harvest or hold their timber."); R. Yin & D. Newman, *A Timber Producer's Entry, Exit, Mothballing, and Reactivation Decisions Under Market Risk*, 5 J. Forest Econ. 305, 306 (1999); *id.* at 317 ("Due to harvest flexibility and relatively low costs associated with temporary suspension of production, mothballing [*i.e.*, the temporary suspension of production,] enters the producer's choice set as a critical marketing decision."); J.

triggers increasing supply, alleviating shortages. Under the Ninth Circuit's approach, however, purchasers will have to think long and hard before bidding up prices in response to a shortage. And without the price stimulus to put additional or more costly resources into service, the owners of timberlands cannot act to alleviate the shortage.[5]

The United States, which relies on market forces to allocate the timber resources it owns among competing pur-

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Prestemon & D. Wear, *Inventory Effects on Aggregate Timber Supply*, Proceedings of the 1998 Southern Forest Economics Workshop 26 (1999) ("Timber supply responds to market signals through the myriad private and public decisions to harvest a portion of timber inventories. The aggregate response to price is, therefore, a function of biology, the environment, the characteristics of the inventory, and the objectives of the harvest decision makers."), available at http://www.srs.fs.usda.gov/econ/pubs/misc/jpp992.pdf; D. Wear & P. Parks, *The Economics of Timber Supply: An Analytical Synthesis of Modeling Approaches*, 8 Natural Res. Modeling 199, 211 (1999) ("Supply in the short and medium runs may be highly variable in response to market fluctuations * * * ."), available at http://www.srs.fs.usda.gov/econ/pubs/misc/dnw941.pdf.

[5] The Ninth Circuit rejected concerns that its ruling would adversely affect the relevant market because—according to one economist's research—the market for alder logs is "a limited, relatively inelastic, resource-based input market." Pet. App. 9a n.14. But it is far from clear why the claimed inelasticity of the market would obviate the need for an efficient pricing mechanism. Even for inelastic resources (such as electromagnetic spectrum), an efficient market awards the resource to the highest bidder because it is the highest-value user. See pp. 9-10, *supra*. In any event, the Ninth Circuit's characterization of the timber market is fundamentally flawed. The timber market is dynamic and the supply of timber delivered to market is quintessentially elastic. See pp. 12-13 n.4, *supra*. More important, the Ninth Circuit's mistake in evaluating the timber market's elasticity illustrates the difficulty with requiring courts to resolve complicated issues of economic theory before determining which legal standard should apply. The virtue of the *Brooke Group* and *Matsushita* test, by contrast, is that it asks relatively straightforward questions that are susceptible of judicial resolution regardless of the elasticity of supply and demand.

chasers, conducts its own business in precisely that fashion. When harvesting rights are set for auction, bidders must bid in excess of an appraised-value reserve price in order to win the right to extract the timber. 16 U.S.C. § 472a(a), (e)(1)(B). In other words, the government increases the amount of timber put on the market when prices exceed a certain threshold (the appraised-value reserve), and decreases the supply of marketed timber when prices fall below that line. That system, moreover, underscores the folly of trying to establish a "fair" price by fiat rather than allowing the market to regulate. Although the government establishes what it believes to be the fair or appraised value as a floor, bidding regularly exceeds that amount. Under the Ninth Circuit's theory, each such bid—because it exceeds the "fair" price—is a potential antitrust violation.

Finally, even in the timber industry, the government has shown its commitment to protecting procompetitive price competition among buyers for the supply of timber, prosecuting bidders who collude to depress auction prices and thereby deprive the government of bids in excess of the reserve price. See *United States.* v. *Champion Int'l Corp.*, 1975-2 Trade Cases ¶ 60,453, 67,040 (D. Or. 1975) ("The bidders, of course, were delighted with this [collusive] bidding pattern because, being without opposition, they were able to purchase the timber sales at or near the appraised value."), *aff'd*, 557 F.2d 1270 (9th Cir. 1977). The Ninth Circuit's disregard for price competition among buyers for resources—and timber in particular—cannot be reconciled with the government's use of criminal prosecutions to protect that competition.

3. As does economic theory, this Court's precedents recognize that price competition has value on both sides of each transaction: Would-be sellers compete for sales by countering each other with lower prices, while would-be buyers compete for inputs by countering each other with higher offers. Each side of the competition "coin" is pro-

tected by the Sherman Act. As this Court warned in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 223 (1940), the antitrust laws bar not only the anticompetitive "raising" and "stabilizing" of prices, but the anticompetitive "depressing" of prices as well.

Indeed, this Court's Sherman Act Section 1 cases are replete with efforts to protect and foster the procompetitive benefits of competition among buyers. The Court established its most explicit defense of buy-side competition in *Mandeville Island Farms, supra.* There, sugar beet growers alleged that sugar beet refiners had conspired to depress the price paid to growers for produce. 334 U.S. at 221-223. The Court, in holding that the plaintiff growers stated a cause of action under the Sherman Act, *id.* at 246, noted that the plaintiffs' claims were not defeated by the mere fact that the plaintiffs were producers rather than consumers:

> It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specifically injured under the treble damage claim are sellers, not customers or consumers. * * * The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these.

Id. at 235-236 (footnotes and citations omitted). The Court found it "impossible to accept" "[t]he idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product * * *." *Id.* at 241. Thus, *Mandeville Island Farms* directly rejected the core of the Ninth Circuit's analysis below: to wit, that competition for the inputs of production does not benefit consumers and does not promote competition throughout the market. See also *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,*

Inc., 340 U.S. 211, 213 (1951) (holding horizontal agreements to fix *maximum* prices unlawful because, "no less than those to fix minimum prices, [they] cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment"); *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 351 (1982) (rejecting defendants' argument that their fixing of maximum consumer prices constituted "procompetitive" conduct, because "[t]he anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation").

More fundamentally, the Ninth Circuit's disparate treatment of predatory conduct by sellers (price cuts) and predatory conduct by purchasers (increased bids) contradicts this Court's established practice of giving equal treatment to buy-side and sell-side conduct. "Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity" is illegal. *Socony*, 310 U.S. at 223; see *Mandeville Island Farms*, 334 U.S. at 236 ("The [Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."). Recognizing that parity of treatment, the courts of appeals have treated bid-rigging and other buy-side efforts to fix prices among competitors under the same standards used to evaluate sell-side efforts to fix prices among competitors. See, *e.g.*, *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242, 245 (10th Cir. 1976) (affirming the finding of collusive buying) (citing *Morton Salt Co.* v. *United States*, 235 F.2d 573 (10th Cir. 1956)); *In re Beef Indus. Antitrust Litigation*, 907 F.2d 510 (5th Cir. 1990); *American Tobacco Corp.* v. *United States*, 328 U.S. 781, 803-804 (1945) (drawing no distinctions between evaluation of alleged sell-side predatory pricing and alleged buy-side predatory pricing by same defendant). There is no reason why Section 2 of the Sherman Act should be read to draw a

distinction between seller conduct and buyer conduct that is wholly foreign to Section 1.

II. The Ninth Circuit's Decision Creates A Conflict On Whether Predatory Buying Claims Require Evidence That The Buyer's Purchases Were Unprofitable

The Ninth Circuit's decision, moreover, cannot be reconciled with recent decisions by the Fifth and Seventh Circuits, including *In re Beef Industry Antitrust Litigation*, 907 F.2d at 510, and *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1360-1361 (7th Cir. 1996), rev'd on other grounds, 522 U.S. 3 (1997).

In the *In re Beef Industry* case, individual cattlemen alleged that IBP, Inc., a beef packer, violated Section 2 of the Sherman Act through predatory buying of fed cattle. Like respondent here, the plaintiffs there alleged that IBP had "attempted to drive its competitors out of the fed cattle procurement market by paying a higher price for fed cattle than the market suggested." *Id.* at 515. The Fifth Circuit rejected that claim because the plaintiffs "presented no evidence that IBP ever paid a predatory price (in this case, a price higher than that which would allow the packer to make a profit) for the fed cattle." *Ibid.* Thus, consistent with *Matsushita* and *Brooke Group*, the Fifth Circuit has held that allegations of predatory buying require evidence that the buyer paid an unprofitable price for the input at issue. Here, the Ninth Circuit reached the opposite result, affirming a judgment for tens of millions of dollars without any finding that Weyerhaeuser "paid a predatory price (in this case, a price higher than that which would allow [Weyerhaeuser] to make a profit)." Instead, the Ninth Circuit held it was sufficient for the jury to find that Weyerhaeuser "purchased more logs than necessary" and thereby prevented competitors from obtaining logs "at a fair price." Pet. App. 7a n.8; see *id.* at 10a.

In *Khan*, the Seventh Circuit stated—albeit in dictum—that allegations of monopsony (buyer market power) should

be judged by the same standard as allegations of monopoly (seller market power). In that case, the Seventh Circuit considered the claim that a gasoline supplier violated Section 1 of the Sherman Act by setting the maximum price at which its customer could resell the product. 93 F.3d at 1360-1361. In explaining the economics of maximum-price-fixing, Judge Posner's opinion noted that "monopsony pricing * * * is analytically the same as monopoly or cartel pricing[, and is] so treated by law." 93 F.3d at 1361 (citing *Mandeville Island Farms*, 334 U.S. at 236); see also *United Airlines, Inc.* v. *U.S. Bank N.A.*, 406 F.3d 918, 925 (7th Cir. 2005) ("[Plaintiff] fancies the position of monopsonist, which the antitrust laws forbid on equal terms with monopoly.") (Easterbrook, J.). Thus, the Seventh Circuit reads *Mandeville Island Farms* to require that buy-side and sell-side conduct be evaluated under the same rubric. The Ninth Circuit's decision in this case, by contrast, draws a sharp distinction between the two, holding that price competition for inputs among buyers, unlike price competition among sellers, lacks procompetitive benefit under the antitrust laws. That result cannot be reconciled with the Seventh Circuit's position that the two are "analytically the same." *Khan*, 93 F.3d at 1361.

III. The Need For This Court's Review Of The Ninth Circuit's Decision Is Particularly Urgent

This Court's immediate intervention is necessary to prevent significant and long-lasting harm from the Ninth Circuit's decision. Given the practical realities of the timber industry, comparable suits arising from timber production will flock to the Ninth Circuit. In fact, approximately one-third of all lumber produced annually in the United States is produced in the West. See J. Howard, U.S. Dept. of Agriculture, *U.S. Timber Production, Trade, Consumption, and Price Statistics 1965-1999* at 61 (Table 29), available at http://www.fpl.fs.fed.us/documnts/fplrp/fplrp595.pdf. And it is easy to imagine that Sherman Act plaintiffs will quickly seize upon the decidedly pro-plaintiff rule now available

there, bringing any claim with a conceivable connection to any of the Western States that make up that jurisdiction.

The result will not merely be litigation. Confronted with the realistic possibility of treble-damages actions for competing too aggressively for logs—even when the bids are profitable—purchasers will compete less aggressively. That means artificially depressed prices, a depressed industry, and depressed supply. Given the sheer size of the timber industry, the disruptive impact should not be underestimated. In 2001, forestry and logging operations employed 78,000 workers, with an annual payroll of $2.16 billion. U.S. Census Bureau, *Statistical Abstract of the United States: 2004-2005*, Table No. 841 (2004). That same year, timber-related manufacturing operations, including sawmills and paper manufacturers, employed 1,090,700 workers, with a payroll of $39.3 billion. *Ibid.* Timber-related manufacturing contributed $95.1 billion to gross domestic product in 2001. *Id.* at Table No. 843.

The Ninth Circuit's decision also affects countless other industries that rely on lumber for production of finished goods. Because the Ninth Circuit's analysis threatens to chill bidders that may quickly need to escalate their bids above historical trend levels, the Ninth Circuit's decision threatens to paralyze the markets precisely when they need to be most responsive. As recent natural disasters—including the Gulf Coast hurricanes—demonstrate, demand for lumber can escalate rapidly to support local rebuilding efforts. The Ninth Circuit's decision retards the price competition that is necessary to bring new and needed supplies on line promptly and efficiently. By regulating price unnecessarily and capriciously, it threatens to leave shortages unredressed and to extend the time it takes to rebuild communities destroyed by such disasters.

Finally, the impact of the Ninth Circuit's decision extends well beyond the timber industry. Any commodity subject to fluctuations in demand or supply, with corres-

ponding fluctuations in price, now must operate under the chilling shadow of uncertainty cast by the Ninth Circuit's decision. The industries subject to such pressures include, but are not limited to, electricity and natural gas, both of which often conduct business amidst rapid escalation and de-escalation of market prices in response to fluctuations in supply and demand. The Ninth Circuit's decision may cause severe dysfunction in those markets, as buyers find themselves unable to compete rapidly and aggressively for resources under changing conditions.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, *amici* respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted.

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